IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

Nos. 391, 392, 393.

CALMAN COOPER, HARRY A. STEIN and NATHAN WISSNER,

Petitioners,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

RESPONDENT'S BRIEF.

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Statement.

All of the petitioners seek a review of the judgments of the County Court of Westchester County, State of New York, entered on December 27, 1950, sentencing them to death. These judgments were entered upon the verdicts of a jury rendered in said Court on December 21, 1950, finding all of the defendants guilty of the crime of murder in the first degree as defined by that portion of Subdivision 2 of Section 1044 of the Penal Law of the State of New York commonly known as "felony murder". Under the mandate of Section 1045 of the New York Penal Law perpetrators found guilty of this crime must be punished by death unless the jury, as part of its verdict, recom-

mend that such defendants be imprisoned for the terms of their natural lives (cf. Sec. 1045-a, New York Penal Law). The jury in the case at bar made no such recommendation as to any of the petitioners (2792). (Numerals in parenthesis in this brief refer to the pages in the certified Record on Appeal to the New York Court of Appeals pursuant to the provisions of Subdivision 3 of Rule 27 of the Rules of the United States Supreme Court.)

The joint jury trial of the three petitioners consumed some seven weeks, having commenced on November 1, 1950, and terminated on December 21, 1950.

On March 6, 1952, the seven Judges of the New York State Court of Appeals unanimously affirmed the judgments of conviction as to all of the petitioners (*People* v. *Cooper, et al.*, 303 N. Y. 856; Official Edition, Weekly Advance Sheets, April 5, 1952; 104 N. E. (2d) 917). No opinion was handed down by the Court of Appeals.

On April 18, 1952, the Court of Appeals entered an order on motion of the petitioners herein amending the remittitur to read as follows:

> "Questions under the Federal Constitution were presented and necessarily passed upon by this Court, viz.:
>
> (1) whether the admission in evidence of the confession of the defendant Cooper violated his rights under the Fourteenth Amendment to the Constitution of the United States;
>
> (2) whether the admission in evidence of the confession and the prior and subsequent oral statements of the defendant Stein violated his rights under the Fourteenth Amendment of the Constitution of the United States;
>
> (3) whether the admission in evidence of the confessions of the defendants Cooper and Stein violated the rights of the defendant Wissner under the Four-

teenth Amendment of the Constitution of the United States;

(4) whether the refusal to sever the trial of the defendant Wissner from that of the defendants Cooper and Stein violated the rights of the defendant Wissner under the Fourteenth Amendment of the Constitution of the United States;

(5) whether the refusal of the trial judge to delete from the confessions of defendants Cooper and Stein all references therein made to the defendant Wissner as a participant in the crime violated the rights of the defendant Wissner under the Fourteenth Amendment of the Constitution of the United States. This Court held that the rights of the defendants under the Fourteenth Amendment of the Constitution of the United States had not been violated or denied" (cf. 303 N. Y. 982; 106 N. E. (2d) 63).

On April 7, 1952, Mr. Justice Jackson of this Court granted a stay of execution of the death sentences pending a determination of the present applications.

Writs of Certiorari, were granted to all of the petitioners on October 13, 1952, limited to the question, as to the admissibility of the confessions.

Questions Presented.

(A) By Petitioner, Calman Cooper.

(1) Cooper contends that the admission in evidence of his confession (Peo. Ex. 59, 1521-2874) admitting his participation in the hold-up and robbery of the money truck owned and operated by The Readers Digest Association at Chappaqua, Westchester County, New York, on April 3, 1950, during which robbery Andrew Petrini was shot and killed by the petitioner, Nathan Wissner, acting in concert

with Cooper and Stein, violated Cooper's rights under the due process clause of the Fourteenth Amendment of the Constitution of the United States.

Questions Presented.

(B) By Petitioner, Harry A. Stein.

Stein contends that the admission in evidence of his confession (Peo. Ex. 64, 1968-2896) and his oral statements prior and subsequent thereto, violated his rights under the due process clause of the Fourteenth Amendment.

Questions Presented.

(C) By Petitioner, Nathan Wissner.

(a) Wissner contends that the admission in evidence of the Cooper and Stein confessions deprived him of his right to due process guaranteed by the Fourteenth Amendment.

(b) This petitioner also urges that the refusal of the Trial Judge to delete all references to his participation in the felony murder from the Cooper and Stein confessions also deprived him of due process.

Outline of the Respondents' Contentions.

The People of the State of New York urge that all of the petitioners were justly convicted for the following reasons:

(1) The confessions of the petitioners, Cooper and Stein, were lawfully obtained under New York law (Sec. 395, N. Y. Code of Criminal Procedure), and in accordance with the requirements of the due process clause of the Fourteenth Amendment to the United

States Constitution, and in harmony with the well considered decisions of this Court and of the New York Court of Appeals.

(2) Not one of the three petitioners testified at the trial at which they were all found guilty of murder in the first degree, resulting in the judgment of death being imposed upon all of them. The jury did not recommend life imprisonment as it might have under Section 1045-a of the New York Penal Law.

By such failure to testify before the Trial Judge and Jury, the three petitioners, all represented by able counsel, deliberately refused to assist the Judge and Jury in determining whether or not the typewritten confessions of Cooper and Stein were coerced. Instead, they choose to rely on statements, allegations and arguments of counsel at the trial and in the briefs to this Court on this application, all of which, of course, do not meet the requirements of legal proof. Innuendo and surmise are offered as substitutes.

(3) Not one other witness appeared on behalf of any of the three petitioners at their trial who testified that any one of them had been beaten, threatened, coerced or intimidated in any manner by the New York State Police or the New York City Police or anyone else from the time of their arrests until the typewritten confessions of Cooper and Stein were taken and executed by these petitioners at the Headquarters of the New York State Police in Westchester County, New York, the County in which the three petitioners participated in the robbery of the money truck owned and operated by The Readers Digest Association which resulted in the felony murder of Andrew Petrini, an unarmed messenger on the truck.

Petrini had been shot through the head by the petitioner, Wissner, without warning, at the beginning

of the holdup, within a few moments after another truck driven by the petitioner, Cooper, and in which the petitioner, Stein, was riding with the accomplice Dorfman, cut off the Readers Digest money truck on a private road on the Readers Digest property in Westchester County on April 3, 1950 and brought it to a halt. The petitioner, Wissner, lay in wait at this rendezvous by prearranegemnt with Cooper and Stein. Wissner used an automatic pistol in murdering Petrini. Stein was armed with a revolver. No resistance had been offered by the victim.

The three petitioners, and their accomplice, Benny Dorfman, who testified against them on the trial, succeeded in looting the Readers Digest truck of money and checks, escaping to Brooklyn, New York City, and dividing the loot at the home of Dorfman within a few hours after the murder, as will be shown, *infra*.

(4) The parole official and the police officers who obtained the confessions of the petitioners, Cooper and Stein, as well as the other witnesses, testified under oath that these confessions were freely and voluntarily given.

(5) The trial Judge, under well-accepted legal principles, submitted to the jury the question as to whether the confessions of Cooper and Stein were voluntary in accordance with New York law (New York Code of Criminal Procedure, Sec. 395; *People* v. *Doran*, 246 N. Y. 409, at 423), and in accordance with the mandate of this Court in *Lyons* v. *Oklahoma*, 322 U. S. 596 at 601, where the majority held:

"The mere questioning of a suspect while in the custody of police officers is not prohibited either as a matter of common law or due process. *Lisenba v. California*, 314 U. S. 219, 239-241; *Wan* v. *United States*, 266 U. S. 1, 14. The question of how specific an instruction in a state Court must be upon the in-

voluntary character of a confession is, as a matter of procedure or practice, solely for the courts of the state. When the state-approved instruction fairly raises the question of whether or not the challenged confession was voluntary, as this instruction did, the requirements of due process, under the Fourteenth Amendment, are satisfied and this Court will not require a modification of local practice to meet views that it might have as to the advantages of concreteness. The instruction given satisfies the legal requirements of the State of Oklahoma as to the particularity with which issues must be presented to its juries, *Lyons v. State*, 138 P. (2d) 142, 164, and in view of the scope of that instruction, it was sufficient to preclude any claim of violation of the Fourteenth Amendment."

The instructions to the Jury in the case at bar by the presiding trial Judge on this issue are quoted *infra*.

(6) The actual killer, Wissner, who murdered Petrini without warning at the inception of the robbery, is an intruder and interloper upon the due process clause of our Fourteenth Amendment. He never vouchsafed a confession of his participation in the murder, either orally or in writing. He did not testify in his own behalf on the trial or on behalf of the petitioners, Stein and Cooper. He chose to forego his precious right to take the stand and assert his innocence before the trial judge and the jury. He also refused to testify as to any alleged violence or intimidation on the part of the police or anyone else.

On the trial, the petitioner, Wissner, was identified as the killer of Petrini by Waterbury, the driver of the Readers Digest money truck. Waterbury also pointed out petitioner, Stein, on the trial as the one who had tied him up during the robbery. The accomplice, Dorfman, on the trial, also pointed out Wissner, Cooper and Stein as the other three participants in

the holdup and robbery which resulted in the felony murder of Andrew Petrini.

(7) The admission in evidence of the typewriten confessions of the petitioners, Cooper and Stein, in which references are made to the participation of Wissner in the felony murder of Andrew Petrini met the requirements of due process, because the trial judge admonished the jury time and time again that such confessions were binding and admissible only against the person or persons who made them. In challenging this procedure, counsel for the killer, Wissner, inferentially denounce our Jury System and say, in effect, our juries are too stupid to take instructions from the trial judge. Such a vicious argument answers itself. The procedure on this trial met the requirements of due process.

(8) The denial of a separate trial to the petitioner, Wissner, met all the requirements of due process and was based upon the sound discretion of the trial Judge.

People v. *Snyder*, 246 N. Y. 491;
People v. *Fisher*, 249 N. Y. 419;
People v. *Feolo*, 282 N. Y. 276;
cf. Sec. 391, New York Code of Criminal Procedure.

In *People* v. *Snyder*, *supra*, Judge Lehman, writing for the unanimous Court, referred to the rule laid down in *U. S.* v. *Marchant*, 4 Mason 258, affirmed 25 U. S. 480, in the following language:

"Section 391 of the Code of Criminal Procedure as recently amended (L. 1926, ch. 461) provides that defendants jointly indicted may be tried separately or jointly in the discretion of the court. It may be assumed that the Legislature did not intend to leave arbitrary choice to the court. Discretion involves

the exercise of a sound judgment, and its attempted exercise may be reviewed by an appellate court, at least where the appellate court has jurisdiction to pass upon questions of fact. The statute has merely restored the common-law rule that a separate trial of defendants who were jointly indicted might not be demanded as a matter of right by the accused but might be ordered in its discretion by the court. (People v. Howell, 4 Johns, 296; People v. Vermilyea, 7 Cow. 108). That rule prevailed not only in England but in this State until changes in this State in 1829 by statute. (See People v. Doran; 246 N. Y. 409.) In U. S. v. Marchant (4 Mason, 258; affd., 25 U. S. 480), Mr. Justice Story has reviewed the history of the exercise of the power of the court to grant a separate trial to persons jointly indicted. He pointed out that at common law as developed in England, persons jointly indicted might be jointly tried unless the court in its discretion ordered that each defendant should be tried separately; though the difficulty of obtaining a jury at a joint trial, if each defendant insisted upon the exercise of his right to interpose the full number of peremptory challenges accorded to him under the law of England, gave rise to a general custom of ordering separate trials unless the defendants agreed to join in all peremptory challenges.

"Since that case all jurisdictions in this country have accepted the rule that defendants jointly indicted are not entitled to separate trials unless the court in the exercise of its discretion so orders. Appellate courts in various jurisdictions have at times reviewed such orders. No general rule limiting or governing the exercise of the court's discretion can be deducted from these decisions. The Legislature has not seen fit to set fixed bounds to the exercise of the discretion it has restored to the courts.

> The courts should apply but one test. Will a separate trial impede or assist the proper administration of justice in a particular case and secure to the accused the right of a fair trial? The decision of the trial court rendered before the trial is dictated by a reasonable anticipation based on the facts then disclosed. The decision of this court rendered upon a review of the trial itself rests upon determination of whether the prophesy has been realized."

In *People* v. *Snyder*, 246 N. Y. 491, both defendants were tried jointly and the confessions of both defendants were received in evidence. The denial of a separate trial to Wissner related to a procedural question under the New York Code of Criminal Procedure, Sec. 391. Such denial was affirmed by the New York Court of Appeals. Due process is not involved in such denial.

General Outline of the Case.

The following fact material is supplied to aid the Justices of this Court in deciding that the three petitioners were justly convicted in Westchester County, New York, of the felony murder of Andrew Petrini in that County on April 3, 1950:

Andrew Petrini was employed by the magazine, Reader's Digest, to ride on a truck from its plant in the Town of New Castle, County of Westchester, New York, to the Post Office and the bank, assisting in handling delivery of mail and money sacks and other parcels (199). On April 3, 1950, in the same town he was shot to death by the petitioner, Nathan Wissner (2[illegible]), during a robbery in which money and checks were taken. Another truck, which intercepted and cut off the Reader's Digest truck was driven by the petitioner, Calman Cooper (546-548-553). The driver of the Reader's Digest truck, Waterbury, was tied up by the petitioner, Harry A. Stein (218).

A fourth conspirator, Benny Dorfman, took the wheel of the Reader's Digest truck and drove it to a secluded lane (559). The case of this defendant was severed, and he testified for the People.

WILLIAM WATERBURY, testified that he was 26 years of age, married, had been in the United States Army and had worked for the Reader's Digest for more than five years as a truck driver whose duties included taking Andrew Petrini to the bank with money to be deposited (198-199). On April 3, 1950, this witness carried two of the bags which contained the checks and were intended for the Railway Express office and Andrew Petrini carried the small bag with the cash in it down to the Reader's Digest truck parked in front of the main building (204-205, see photograph, People's Exhibit No. 7 at page 2809). These bags were put in the right hand side of the Reader's Digest truck and Andrew Petrini sat on a small cushion with his back to the windshield (213-214). Neither Waterbury nor Petrini was armed (214).

This truck left the front of the Reader's Digest Building and started out its driveway to the highway known as Route 117 but another truck in front of Waterbury kept cutting him off and finally forced him to stop and then the witness Waterbury saw the petitioner Wissner making a last step towards the door on Petrini's side and Wissner grabbed the door and it did not open. Then the defendant Wissner shot Petrini and came through the door and ordered Waterbury to get into the back of the truck, where he was tied up by the defendant Stein (215-216-218). The truck then was driven off by someone whom he did not see to a road where it was left (216-217). Andrew Petrini, when the shot was fired, had slumped over and was bleeding and there was a hole in the glass window of the door which had not previously existed (219, see People's Exhibit 18 in Evidence at p. 2827). Waterbury noticed after the robbers had left that the bags containing the checks and the money

were gone (219). The gun used was described by the witness as a revolver (221). Andrew Petrini died at about 10:10 P. M. on April 3, 1950 (167). Except for the bullet wound the body was found to be normal and the cause of death was given as firing a bullet into his head (172).

The proof established that the idea of holding up the money truck of the Reader's Digest Association originated in the mind of petitioner Cooper (2053-2055-2056-2874).

(1) The Brassett Testimony.

The People's witness, Brassett, testified that he and petitioner, Calman Cooper, had been inmates at the Federal prison in New York City in 1949, the year before the murder in question. Brassett had been sentenced for mail theft, having stolen money from mail addressed to the Reader's Digest in Pleasantville, New York. Brassett pointed out Cooper on the trial and stated that he had met Cooper at the Federal prison in New York City after Christmas of 1948. Brassett and Cooper continued as inmates together for approximately five or seven months until the summer of 1949. They worked together and spent their recreation time together in prison (2053-2056).

Brassett told Cooper about the mail route, the pouches of mail, the volume of business of the Reader's Digest and that if Brassett "wanted to make a big haul," he "could make it through the Digest and really make something out of it for the rest of my life" (2056-2057). Cooper and Brassett also discussed the money carried on the Reader's Digest truck, and the routine of the truck (2058-2059).

(2) The Witness, Jeppeson.

On April 3, 1950, the day of the crime, and for sometime prior thereto, Arthur L. Jeppeson was employed at the Spring Auto Renting Company, at the corner of Spring and Thompson Streets, Manhattan, New York City. Jeppe-

son identified People's Exhibit 20 (223-2828), a photograph of a 1937 Chevrolet carryall truck, the truck used in the hold-up of the Reader's Digest truck, as one that he had rented to Cooper on four occasions, March 11, 18, 25 and April 3, 1950, the day Andrew Petrini was murdered. Cooper rented the truck under the name of Walter W. Comins and exhibited an operator's license No. 1434549 in the name of Walter William Comins (779-785) (People's Exhibits 41-42, 2852-2854). After Cooper rented this truck from Jeppeson at ten or ten-thirty on the morning of the crime, it was never returned to Jeppeson up to the time of the trial (786). People's Exhibit 37 (695-2845), is a reproduction of the application for the New York State Operator's License in the name of Walter William Comins, No. 1434549. The People's Witness, Perlmutter, of the New York State Motor Vehicle Bureau, established that an operator's license No. 1434549 was issued on November 3, 1949, pursuant to the application, People's Exhibit 37. The police were in contact with Jeppeson on the night of April 3, 1950, shortly after the commission of the crime, because this rented truck was abandoned by the three petitioners near the scene of the crime, was found by the State Police, and traced to Jeppeson.

Some two months later, on June 5, 1950, just a few moments before Cooper's arrest, Jeppeson saw Cooper on 120th Street, between Morningside and Amsterdam Avenues, Manhattan, New York City. Jeppeson had recived a call from the State Police by previous arrangement. Jeppeson walked towards Cooper on 120th Street and Cooper touched Jeppeson on the arm. Cooper then told Jeppeson: "that this truck that he rented from me was in a killing upstate and he had nothing to do with it" (788-789).

Jeppeson then asked Copper: "Why the hell didn't you report it to the police," and "I asked him about the license, what became of the license, why did he give me that

license", and Cooper said: "That is the license they give him to give me" (789). Cooper also asked Jeppeson if he had been shown any photographs of Cooper and Jeppeson "told him yes". Cooper entreated Jeppeson not to identify him and Jeppeson promised that he would not (790).

Of course, Cooper was not in custody at this time on the morning of June 5, 1950. No threats, fear or force had been exerted against him. No promises had been made to him. He was at liberty on the streets of New York City. What inferences, except those of guilt, could the triers of the facts draw, observing Jeppeson, the honest business man, as he gave this crushing evidence against Cooper? For all practical purposes, Cooper had admitted guilty knowledge to Jeppeson. The character and integrity of Jeppeson was unimpeached.

A detective was following Jeppeson during this incident and Jeppeson nodded to him (789). It was at this time that Sergeant Sayers and Sergeant Barber of the State Police closed in and took Cooper into custody (790-791).

According to Sergeant Sayers, this arrest took place sometime about 9:15 on the morning of June 5, 1950 (1310-1311). As Sergeant Sayers, in the company of Sergeant Barber of the State Police and Detective Mulligan of the New York City Police accosted Cooper, Cooper had his hand in his right-hand coat pocket. After identifying himself and his companions as police officers, Sergeant Sayers ordered Cooper to take his hand out of his pocket. Sergeant Sayers felt an object in Cooper's pocket. Sergeant Sayers then grabbed Cooper by both arms, and as Cooper started to wheel around, Sayers threw Cooper against the building which had a cement wall and then took Cooper into custody (1311).

The extent of any injuries that C oper may have sustained during this violent episode at the time of his arrest is unknown.

(3) The Witness, William Cooper.

Called by the People, William Coper testified that he is the brother of the petitioner, Calman Cooper (696). He also used the name Walter William Comins (697).

William Cooper, or Comins, admitted that he made the application for an operator's license, People's Exhibit No. 37 (698), under the name of Walter W. Comins. This is the operator's license used by the petitioner, Cooper, to hire from Jeppeson, the truck used in the robbery of the Reader's Digest money truck.

William Cooper also registered at the Edison Hotel, 227 West 47th Street, New York City, on November 1 and 2, 1949, under the name of W. W. Comins and he received the operator's license in the mail at the Edison Hotel (698-699), although his home was in Jamaica, Long Island (701).

William Cooper or Comins went to the Federal Prison, New York City, on January 6, 1950, and was still incarcerated there on November 17, 1950, when he testified on the trial in the instant case. He stated that when he went to prison he left the operator's license with his papers at home (700-701).

(4) The Witness, Estelle Norma Cooper.

She is the wife of William Cooper. She had lived with her husband for six years prior to January, 1950. She knew the petitioner, Calman Cooper, and saw him at her home several weeks after her husband was sentenced to Federal Detention Headquarters in January, 1950. The petitioner, Cooper, came to her home several times in January and February, 1950, and several times in March, 1950. The petitioner, Cooper, had access to William Cooper's

papers on these visits and assisted in the administration of William Cooper's affairs during February and March, 1950 (703-704). The People urged on the trial that it was during this period that the petitioner, Cooper, appropriated the operator's license illegally obtained by his brother, William Cooper or Comins, and used it to rent the truck used by the three petitioners in the hold-up of the Reader's Digest money truck.

(5) The Accomplice, Dorfman.

Dorfman, who testified for the People, had no prior criminal record. He and Wissner were partners in the automobile rental business in New York City on the day of the crime and for some months prior thereto (486-487).

Dorfman knew the petitioners, Cooper and Stein, having met them about six weeks prior to the commission of the crime at Dorfman and Wissner's place of business. Cooper and Stein were together (488). Dorfman, Cooper and Stein had visited the scene of the crime and its vicinity at least three times before the day of the hold-up and watched the operations of the Reader's Digest money truck on the highway and in the vicinity of the Post Office in Pleasantville. Cooper, Stein and Dorfman discussed the operations of the truck on these occasions (491-495). Cooper drove the Spring Auto Rental truck which he had rented from Jeppeson, (People's Exhibit 9, 2812), on these occasions and on the day of the crime (489-543-1625). Cooper carried the guns on these trips (504). Cooper discussed the hold-up plans with Dorfman and Stein (505).

Dorfman placed Cooper in the company of Wissner and Stein on the day of the crime before starting out from Manhattan. Cooper drove the Spring Rental Truck to the scene of the crime and drove it during the time that it cut off the Reader's Digest truck. Cooper drove the Spring Rental truck from the scene of the hold-up and shooting to a point where a "get-away" Chevrolet car had been parked.

Cooper then drove in the Chevrolet passenger car to the place where Dorfman had driven the Reader's Digest truck with Wissner, Stein and Waterbury in the rear. The petitioners, Wissner and Stein, then entered the Chevrolet "get-away" car driven by Cooper (562). Cooper also carried the tan valise (People's Exhibit 28) with three guns in it (536-562).

Dorfman also placed Cooper, Stein and Wissner in the Chevrolet sedan on the ride to the Bronx, New York City, subway after the robbery and shooting was completed. Cooper drove for a while and then Wissner took over (562).

Cooper boarded the subway in the Bronx with Dorfman, Stein and Wissner (568). Cooper finally arrived at Dorfman's apartment in Brooklyn with Dorfman, Stein and Wissner about 5:30 P. M. Dorfman's wife was at home with their children. Stein and Cooper had the valises. Cooper took part in dividing the loot in Dorfman's apartment. Then Cooper and Stein left (569-572).

(6) The Witness, Regina Dorfman.

She saw Cooper enter her apartment with Wissner, Stein and her husband, the accomplice Dorfman, between five and six P. M. on the day of the crime (948).

Either Cooper, Stein or Wissner carried the tan valise, People's Exhibit 28 (536-2834), in which the fragment of the Reader's Digest Discount Certificate was found later by the State Police (950). Cooper and Stein were introduced to her (951).

Cooper went into a bedroom with Dorfman, Stein and Wissner. Cooper and Stein left together within an hour (951-953).

(7) The Witness, Michael Homishak.

Homishak, who had shared space with the petitioner, Wissner, and the accomplice, Dorfman, at their place of business in New York City, saw petitioner, Cooper, with

Stein, Wissner and Dorfman at the Wissner-Dorfman automobile rental agency at times during the six-weeks just prior to the robbery and murder (887-888).

Homishak also saw Cooper in the company of Stein, Wissner and Dorfman at 11 A. M. on the morning of the day of the crime in the vicinity of the Wissner-Dorfman rental agency (889-890).

Cooper left the premises with Wissner and Stein before noon on the day of the crime (890). Homishak did not see Cooper again that day.

Andrew Petrini was shot to death during the hold-up of the Reader's Digest truck at approximately 3 P. M. that day (205-211).

The Confessions and Admissions of the Petitioners, Cooper and Stein, Were Properly Received in Evidence.

As to the Confession of Cooper.

The confession of Cooper (People's Exhibit 59, 2875), was admitted in evidence (p. 1521) after the deletion of certain references to the petitioners, Stein and Wissner. Cooper recites in this confession intimate details that could not possibly be known to anyone except a participant in the crime.

Cooper's confession takes up approximately eleven pages of the record. It was taken in the presence of New York State Parole Commissioner, Edward J. Donovan and John P. Reardon, the District Assistant Director of the New York State Parole Board, Trooper Buon, Corporal McLaughlin and Sergeant Sayers of the State Police and notarized by Sergeant Barber of the State Police.

Cooper not only disclosed his association with Brassett but also revealed his renting from Jeppeson of the Spring Auto Rental Truck used in the crime, under the name of W. W. Comins, the preliminary visits to survey the scene

of the planned crime, the routine of the Reader's Digest truck, his participation in the crime, the flight and disposition of the loot (pp. 2875-2888).

Corporal McLaughlin, who typewrote Cooper's confession in the presence of Cooper while the questions were being addressed by Sergeant Sayers (1171), testified that no force or threats were used against Cooper nor were any promises made to him (1174). Cooper signed the confession in the presence of Corporal McLaughlin and Cooper made corrections in his own handwriting after reading the confession (1172-1173).

Troopers Hess and Leon testified they had taken turns in guarding the defendant Cooper from his arrival at the State Police Headquarters to the taking of the confession, and that they had brought to Cooper the same food that was served to the troopers at each meal, and that a mattress was brought in and Cooper slept on the night of June 5th (confession was made on evening of June 6th) on a mattress from approximately 12:30 A. M. to after 8 A. M. (1387-1405, 1412-1439).

The report of Trooper Leon relating to the period during which he guarded Cooper (Peo. Ex. 63 for identification, marked at p. 1544), was read by the trial Judge who ruled that he found nothing contradicting the testimony of Trooper Leon (1571).

District Assistant Director John T. Reardon of the New York State Board of Parole, and an Assistant to Parole Commissioner Donovan, testified as to his presence in the headquarters of the State Police in Westchester County on the evening of June 6, 1950, at 8:00 P. M., when he conversed with Cooper at Cooper's request (1442-1447). (This negatives assertions in petitioners' briefs that the petitioners were held incommunicado.) Reardon declared that at this time Cooper did not complain to him that he had been beaten or threatened (1449).

Reardon noticed no wounds, cuts or bruises on Cooper on the evening of June 6 (1449).

Reardon's testimony at pages 1452 and 1453 indicates that Calman Cooper confessed after he was assured by Parole Commissioner Donovan that his brother, Morris Cooper, would not be punished for his parole violation for being in New York State instead of Florida at the time that his brother, the petitioner, Calman Cooper, was arrested.

If Cooper confessed his guilt in the case at bar to relieve his brother, Morris, of any penalty that might follow a parole violation, such a confession is valid under Section 395 of the New York Code of Criminal Procedure.

At ten o'clock on this evening of June 6, 1950, Cooper gave an oral confession to the Parole Officer Reardon and Parole Commissioner Donovan (1453). Cooper seemed to be in normal physical condition, although a little tired. Reardon noticed no wounds, cuts or bruises and Cooper did not complain that he had been mistreated, threatened or beaten (1454). No promises were made to Cooper concerning himself (1458).

Trooper Buon and Sergeants Sayers and Barber of the State Police also denied on the stand that any threats, violence, force or promises had been exerted against Cooper (2116-2074-1319).

Trooper Buon, Corporal McLaughlin, Sergeants Sayers and Barber of the State Police and Director Reardon of the State Parole Board were all subjected to cross examination by petitioner's counsel concerning the circumstances under which Cooper's confession was taken. Despite this fact no evidence of threats, force, violence or promises was produced on these cross examinations.

In addition, Corporal Dershimer and Troopers Dirschka and Pietrack testified on behalf of the People as to their

parts in the investigation (1095-1103), but were not cross examined by the defense as to any threats or violence. Corporals Brann and Sweeney and Trooper Crowley were produced at the defendants' request and examined by defense counsel (2372-2293-1684-2382), but they were not questioned by the defense as to any threats or beatings. Moreover, on another occasion, Sergeants Hardy and Horton, Corporal McLaughlin and Troopers Leon, Crowley and Tudesco were produced in open court by the People at the request of defense counsel during the cross examination of the Reader's Digest truck driver, Waterbury (417-419), but were not interrogated at this time as to any threats or force exerted against any of the petitioners while they were in custody and before arraignment. At page 2069 the District Attorney offered to produce any other police officers requested by the defendants.

The petitioners personally and in open court had an opportunity to view all of these officers and advise their counsel that one or more had threatened or beaten them. The best proof that these officers did not beat or threaten the petitioners lies in the fact that the defense never examined them on this issue. No witnesses called either by the People or the defense testified that any of the petitioners were threatened or beaten while in custody. Not one of the petitioners testified on the trial.

Motives for Cooper's Confession.

Insofar as Cooper is concerned, the jury may well have found that the motivating force behind Cooper's decision to confess was the fact that Cooper knew that Jeppeson had been taken into custody with him and that Cooper knew the State Police were well aware that Jeppeson had rented the truck used in the crime to Cooper. In addition, Cooper knew that he had made a damaging statement to Jeppeson on West 120th Street, New York City, on the morning of June 5, 1950, immediately prior to his arrest. Moreover,

Cooper also knew shortly after his arrest, that the State Police must be familiar with his conversations with Brassett at the Federal Prison, New York City, concerning the Reader's Digest money truck because shortly after Cooper's arrest, Brassett was brought into the presence of Cooper at State Police Headquarters in Westchester County (1312).

Under these circumstances, the jury may have well found that Cooper realized the hopelessness of his position and decided to make the best bargain possible.

The record shows that while Cooper was in the custody of the State Police, he assisted the Police by travelling more than twenty-five miles from the State Police Headquarters in Hawthorne, New York, to Brooklyn, New York, where he pointed out the home of the co-conspirator, Dorfman, in an effort to aid in the arrest of Dorfman (2068-2069).

It was evident that the State Police closed in on Cooper quickly and suddenly on June 5, 1950, because he was about to leave for Florida (2645). Cooper also knew that his brother, Morris, had violated his parole by being in New York instead of in Florida. In fact, Morris Cooper, was taken into custody at the Air Lines Terminal in New York City shortly after Calman Cooper's arrest, while attempting to return to Florida (2039-2040). Morris Cooper, and Charles Cooper, the father of Morris and Calman, were suspects in the opinion of the State Police (1319).

It could appear quite logical to any jury that Calman Cooper, realizing that Brassett and Jeppeson were available as witnesses against him, that his brother, Morris, was in custody as a parole violator, and that his father was also detained as a suspect, and knowing that his brother and father were innocent of any complicity in the crime charged, would seek to obtain the freedom of his father and brother in exchange for a statement concerning his

participation in the crime and the parts played by the accomplice, Dorfman, and the petitioners, Stein and Wissner.

This is precisely what the petitioner, Cooper, chose to do. He requested an interview with the New York State parole authorities which was granted. He spoke with Assistant Director John T. Reardon at 8 P. M. on June 6, 1950, at Westchester County State Police Headquarters. Cooper, evidently was not satisfied that Director Reardon had sufficient authority to grant Cooper's request as to liberating his father and brother, and so one of the New York State Parole Commissioners, Edward Donovan, came to Westchester State Police Headquarters later that evening at the request of Director Reardon, and it was not until Calman Cooper was assured by Commissioner Donovan that his brother, Morris Cooper, would not be punished for parole violation, that he confessed his guilt that same evening in the presence of Director Reardon and Commissioner Donovan.

In sharp contradiction of counsel's pleas that Cooper's spirit was broken by threats and violence, this evidence would indicate to any sensible jury that Cooper was master of the situation and laid down, himself, the terms upon which he would confess his guilt of the crime charged (1316).

An attempt is made in the brief of the petitioner, Stein, to create the impression that the father of petitioner, Cooper, appeared before Cooper in handcuffs prior to the taking of the Cooper confession. The evidence shows that this occurred after Cooper had confessed (cf. 1366-1372).

The good faith of the State Police on this issue is further substantiated by the fact that Charles Cooper, the father of the petitioner, Calman Cooper, was released by the State Police on June 7, 1950, the day after Cooper confessed his guilt and a full day before the arraignment,

having been cleared of any guilt by Cooper and by the petitioner, Stein (1382).

As to the Confession of the Petitioner, Stein.

Compelled by the practical necessity of taking Stein into custody for the same reasons that held true in the case of Cooper; namely: the fear that Cooper might get away to Florida before the identity of those associated with Stein and Cooper in the killing on April 3, 1950, could be more definitely established, and the fear that Stein would also flee if he discovered Cooper's arrest, the State Police arrested Stein at his brother's home in New York City at 2:00 A. M. on Tuesday, June 6, 1950 (1685-1697-1957-1959). (The petitioner, Wissner, was still at large and the accomplice, Dorfman, was a fugitive.) The State Police were in plain clothes, and were accompanied by New York City Detective William Mulligan who told the petitioner, Stein, in the immediate presence of his brother, Lou, that Stein was being arrested by the State Police (1959-1697).

The State Police have jurisdiction throughout the State, and power to arrest any place in the State (1699), they are Peace Officers of the State and this crime constituted a felony (Executive Law, New York, Section 223). Moreover, New York City is within the territory of Troop K of the State Police (1903) which was investigating the case. Stein then was taken to the State Police Headquarters in Hawthorne, in Westchester County, where the crime had been committed, arriving there at about 3:00 A. M. (1689) on June 6th. He was not questioned until 10:00 A. M. June 6th, and at that time denied any connection with the killing (1904-1906).

At 2:00 A. M. on June 7th, Captain Glasheen showed a portion of Cooper's confession, which implicated Stein, to Stein and told him to "sleep on it" (1938-1939-1954). Shortly after 9:00 A. M. Captain Glasheen received a mes-

sage that Stein wanted to see him, and a little later between 10:00 and 11:00 A. M. Stein made an extended oral statement in which he gave all details and implicated himself in the hold-up (1908-1909).

After lunch the formal written confession (Peo's. Exh. 64, 1968-2896) was taken by a civilian stenographer, Mrs. Anna Klaus, in one of the offices of the State Police on June 7, beginning at about 1:30 P. M. and ending at 4:30 P. M. (1576-1579). All of the answers were made by Stein to questions put by Captain Glasheen (1578). No one had Cooper's confession there to use in prompting Stein (1939). After Stein's confession was typed, it was read by Stein and read to him, and he made corrections and initialed them (see pp. 2900 and 2902) before signing the confession (1580). Mrs. Klaus testified no force or violence was used and no promises made during the time she was with defendant taking his confession, and that he freely answered the questions (1581-1582). Her stenographic notes were read by Stein's counsel (1614-1615, Stein's Exh. CC, 1615).

Stein never complained to State Police Captain Glasheen, the Commander in New York City and adjoining Westchester County, that he had been beaten, mistreated or threatened in any manner by any of the Police Officers under his command (1913). Captain Glasheen saw no cuts, wounds or bruises on any portion of Stein's person at any time on June 6th or 7th.

The following day, June 8th, Stein went with Captain Glasheen and Trooper Crowley to the Reader's Digest property, and Stein pointed out the location from which he had observed the main entrance from which the Reader's Digest truck commenced to leave the premises on the day of the robbery and murder (1699-1702), and related on the spot how this crime had been committed, and also went over the route to point out a spot at which he and the others had thrown away the guns (1992-1996).

Again on that same evening the petitioner, Stein, was brought into a room in the State Police Headquarters, and in the presence of the District Attorney and two Assistant District Attorneys (2143), he identified one of the persons there (William Waterbury) as being the driver of the Reader's Digest truck whom Stein had tied up in the back of that truck on April 3, 1950, the day of the robbery and killing (2161). When Dorfman could not be found on Thursday, June 8, Stein along with the petitioners, Cooper and Wissner, was arraigned before a Magistrate on Thursday night, June 8th (2136), and then taken to the Westchester County Jail.

On the morning of June 9th, Stein was examined by Doctor Robert Vosburgh, attending physician at the jail, who found bruises in the left bicep area (1712, see Peo's. Exh. 65, at p. 2909). This was the examination given to all new prisoners, and did not result from any complaint or request of the defendant.

The trial Court charged the jury that the delay in arraignment of all of the petitioners was unnecessary as a matter of law (2777). In addition, the only undisputed affirmative proof of any change in Stein's physical condition related to the bruises on the very small area of the belly of the muscle of the left bicep, which could have been caused by a strong grip of one of the arresting officers at the time he was taken into custody (1737-1739). There is no proof in the entire record that these marks resulted from any beating, or that the confession and the numerous admissions flowed from them. Whatever circumstantial inferences might be drawn from these facts alone, since Stein did not take the stand to offer any proof, was rebutted by the full testimony of the questioning officer, Captain Glasheen, and the stenographer, Mrs. Klaus, and other witnesses present when the Stein confession was taken and by other police officers.

Contrary to the impression attempted to be created that Stein was held in a place where he could be coerced by questioning, unobserved by others, the civilian witness, Jeppeson, saw Stein when Jeppeson went down to get a pack of cigarettes in the room where Stein was seated (808). Apparently this was on the morning of Tuesday, June 6th, before Stein confessed his guilt. Again on Thursday, June 8th, before Stein made his identification of Waterbury, the driver of the Reader's Digest truck on the day of the murder, the witness, Regina Dorfman, saw Stein on the first floor of State Police Headquarters seated on a couch reading a paper (979). Stein then and there said that he knew Regina Dorfman, the wife of the accomplice, Benny Dorfman. Then Stein, in the presence of the District Attorney, exhibited clearly his independence of compulsion by denying he had supplied the tape and twine used in the holdup (2163).

The testimony of John Duff, of counsel for petitioner; Stein (1827), presents only an issue of fact as against the unalterable record made by Doctor Vosburgh. This resourceful and experienced attorney, who had seen Stein on June 9th, made no complaint to the County Judge of Westchester County when he was before him with Stein on June 15th when Stein was arraigned to plead to the indictment. Stein himself made no complaint to the Magistrate on the night of June 8th when he was first arraigned nor did he complain to the County Judge, when he was arraigned on June 16th.

Most important of all, it appears without contradiction, that after Stein had been shown a portion of Cooper's confession he was left to "sleep on it", so that the oral statement the next morning was not the product of questioning during the night but of his own reflection. What was more natural than his own bitterness at Cooper and a desire to "get even" (2239).

Motive for Stein's Confession.

The motivation for Stein's confession, its efficient cause, was bitterness against Cooper for having implicated Stein. This came as a spontaneous outburst to a New York City detective on June 7th, in the evening after his confession had been given that afternoon:

> "He said that 'that rotten son-of-a-bitch Cooper it is hard to believe he would put me in the way he did, he put me right into the seat, I was the best friend he ever had; well, if I must go, I will take him with me'" (2239).

This realization of full implication by Cooper is an important factor (*People* v. *Borowsky*, 258 N. Y. 371, 372). The Court of Appeals in referring to the confession of the defendant, Borowsky, in this case, said: "A jury might reasonably find that he yielded not to fear of violence, but to a conviction that denial of guilt was hopeless when his confederates had turned against him".

At the time Stein began to give his detailed oral statement on June 7th, Wissner had not yet arrived at State Police Headquarters (1950-1951). An effort was being made to apprehend all of the four involved in the crime and arraign all together, and this continued to the evening of June 8th, 1950 (1947, 2008, 2088, 2089, 1320, 1321, 1322, 1323) when the three petitioners were arraigned, all efforts to apprehend the accomplice, Dorfman, having failed.

The petitioner, Wissner, was not arrested in lower Manhattan, New York City, until June 7, 1950 at approximately 9 A. M., two days after the arrest of Cooper and one day after the arrest of Stein. The fourth participant in the robbery and murder, Dorfman, was a fugitive and did not surrender until June 19, 1950 long after the three petitioners had been arraigned, indicted by the Westchester

County Grand Jury and charged with the commission of the crime of murder in the first degree.

In fact a State Trooper was stationed in the Dorfman apartment in Brooklyn on the day and night of the arraignment on June 8, 1950 of the three petitioners in the hope that Dorfman might be apprehended and arraigned at the same time. This effort proved futile (2088-2089).

In the cases at bar, this Court is asked to infer that because certain bruises appeared on Stein and Cooper on June 9, 1950, that their confessions on June 6 and 7 were extorted by beatings.

In the case of Stein we have seen that the bruises on the bicep area could have been caused by the grip of a strong man, and Officer Crowley who took Stein from his apartment to the State Police headquarters weighed 225 pounds and obviously was such a husky, strong man. It was a reasonable deduction for the jury to make that in taking Stein in for the crime of murder that at some time Crowley or one of the others had a tight grip on Stein. In Wissner's case there was concealment of previous medical treatment which was inadvertently revealed when his counsel gave Captain Glasheen a chance to show that he know from questioning other people "that Wissner, when taken into custody, had injuries, he was under a doctor's care" (2026). This having been brought out before the jury, Wissner's counsel promised to show by X-rays that this was limited to the sacro-iliac area (2027) but these were never produced although Wissner presumably could make this proof by witnesses other than himself, if he so desired. Other suspicious facts were that when viewed by the doctor at the Westchester County Jail about 10 A. M., on June 9, 1950, the morning after his arraignment, there were abrasions on Wissner's shins, which have a maximum 5-hour healing time (1772) and he reached the jail before midnight the preceding night, and also Wissner on June 12th

had injuries which were not revealed on the complete examination of June 9th (1810). Sergeant Sayers said he had thrown Cooper against a wall hard because he believed his hand held a weapon in his pocket. This was a competent cause of some of the injuries. Doctor Vosburgh, the jail physician, said that the injuries of all of these men could have been caused in a number of ways, including self-infliction (1810).

In this case the confessions of Cooper and Stein were made from understandable motives. They were fed and they slept. The detention was not for the sole purpose of obtaining a confession where no other proof existed, but was forced upon the police by the need to take Cooper into custody before he left the State, and the hope of completing the investigation within a compressed period thereafter. This was proved when the arraignment occurred on June 8, 1950, the day Dorfman was expected in New York but did not show up. Cooper's confession was given first to a New York State parole commissioner whom he had sent for. There is no proof from anyone that these confessions were the result of violence. No complaint was made to the magistrate or the District Attorney at the arraignment on June 8th, 1950, or to the jail officials who received them on the evening of June 8, 1950 after the arraignment.

Petitioners' briefs assume questioning by relays of police but the testimony showed clearly that both confessing defendants slept and the questioning was not uninterrupted (see Cooper's own brief at pages 9 and 10).

Stein was permitted to reflect after a part of Cooper's confession was read to him and he was left to "sleep on it" (1954).

There is no testimony by any petitioner or any witness that Cooper or Stein were held incommunicado. The day before the arraignment Cooper's father was out on the

streets and free to communicate with anyone. The only request was one by Stein for information as to his mother who was ill, and this was obtained for him by telephone. Despite Cooper's father's ability to retain counsel, no attorney went to State Police Headquarters or to the Court on the petitioner's behalf. Stein did not ask to see his lawyer (1930, 1938) on the question of the good faith of the New York State Police, the record shows that warrants had been issued to the State Police by the New York State Parole Officials requiring the temporary detention of the petitioners, Cooper and Stein.

Upon the record the Trial Judge's submission of the voluntariness of the confessions to the jury as a question of fact was proper. The issue of alleged coercion was clearly presented to them (pp. 2765-2769, incl.). The Trial Judge also instructed the jury that the confessions of the petitioners, Cooper and Stein, were binding only upon the confessors and no one else (2769-2770).

Argument.

(A) Delay in arraignment was insufficient to bar the Cooper and Stein confessions from the Jury.

In urging that the confessions of the petitioners Cooper and Stein should not have been received in evidence, petitioners stress the delay in arraignment of both. However, the New York Court of Appeals has consistently held that delay in arraignment, in and of itself, is not sufficient to exclude a confession.

In *People* v. *Trybus*, 219 N. Y. 18, at 22, the Court of Appeals reiterated the well-accepted rule in New York:

> "* * * The practice of detectives to take in custody and hold in durance persons merely suspected of crime in order to obtain statements from them

before formal complaint and arraignment, and before they can see friends and counsel, is without legal sanction. The question is not, however, whether the detective struck defendant or held him illegally in custody. Neither of these facts, *per se*, makes the reception of the statements in evidence illegal as matter of law (*Balbo* v. *People*, 80 N. Y. 484), although they are properly to be considered by the jury in determining the voluntariness of the statements. The question is whether defendant, voluntarily, not under the influence of fear induced by threats or under a stipulation of the district attorney not to prosecute (Code Crim. Pro. Sec. 395), made the statements."

The traditional attitude of the New York Court of Appeals on this question was well summarized in *People* v. *Doran*, 246 N. Y. 409 at 423:

"Reviewing this case, therefore, as a whole, I think all the issues of fact were fairly left to the jury who heard all the testimony, saw all the witnesses, arrived at their conclusion apparently after a careful and discriminating consideration, and that we are not justified in disturbing their verdict because we may be of the opinion that the district attorney should have taken the defendant's confession in Albany instead of in Watervliet, or because the police authorities in their zealousness to unravel the Jackson murder did not immediately arraign the defendant after his arrest. Delay in arraignment does not exclude a confession. (*People* v. *Trybus, supra.*) Neither does the fact that officers of the law questioned the defendant persistently in regard to his connection with the crime (*People* v. *Rogers*, 192 N. Y. 331, p. 348), nor that they failed to warn him of his privileges or rights. (*People* v. *Kennedy*, 159 N. Y. 346, 360; *People* v. *Randazzio*, 194 N. Y. 147.) That the confession was sworn to is likewise no objection (*People* v. *Mondon*, 103 N. Y. 211, 219).

> Even when evidence has been procured through wrong acts upon the parts of officials, it is not necessarily excluded. (*Adams* v. *New York*, 192 U. S. 585.)"

In *People* v. *Mummiani*, 258 N. Y. 394, at 396, the Court of Appeals again followed the doctrine enunciated in the *Trybus* and *Doran* cases, *supra:*

> "Disregard of the duty of arraignment does not avail, however, without more to invalidate an intermediate confession. (People v. Trybus, 219 N. Y. 18; People v. Doran, 246 N. Y. 309.) It is only a circumstance to be weighed with others in determining whether a confession has any testimonial value."

In *Stroble v. California*, decided April 7, 1952, 343 U. S. 5 (Law Ed. Vol. 96, 529, at 540), Mr. Justice Clark, writing for the majority of the Supreme Court Justices, held that delay in arraignment in the California Court did not constitute a denial of due process and said at page 540:

> "Upon the facts of this case, we cannot hold that the illegal conduct of the law enforcement officers in not taking petitioner promptly before a committing magistrate, coerced the confession which he made in the District Attorney's office or in any other way deprived him of a fair and impartial trial."

(B) The failure of every one of the petitioners to testify as to any threats or violence exerted by the police while they were in custody leaves the record barren of the necessary proof required by section 395 of the New York Code of Criminal Procedure, and as required by the decisions of this Court.

Of course, the petitioners had every right to refuse to testify. However, by doing so they ran the risk that there would be insufficient proof that their confessions were

obtained through fear produced by threats or violence. If such illegal practices had been used, which the People deny, the petitioners themselves would have been the best witnesses on this issue.

This consideration is of the utmost importance in this case because of the great number of witnesses who denied that any threats or violence had been exerted either against Cooper or Stein at various times while they were in custody, including:

(1) Captain Daniel F. Glasheen, Commander of Troop K, State Police.

(2) Sergeant Richard T. Barber, State Police.

(3) Sergeant Joseph W. Sayers, State Police.

(4) Corporal Walter E. McLaughlin, State Police.

(5) Trooper Thomas V. Buon, State Police.

(6) Trooper Frank K. Hess, State Police.

(7) Trooper Arthur Leon, State Police.

(8) Supervisor John T. Reardon, New York State Division of Parole.

(9) Mrs. Anna A. Klaus, Civilian Stenographer, State Police.

Every one of the persons, who had charge of Cooper or questioned him, said no threats or violence were employed.

Other troopers, Brann, Pietrack, Sweeney, and Crowley, who had custody of Stein at various times, testified and were not questioned by counsel for the petitioners as to use of force, threats or violence.

(C) The problem confronting the State Police in view of the confessions of Cooper and Stein.

Cooper had been arrested on June 5, 1950, and confessed his guilt on the evening of June 6, 1950. Stein was arrested during the early morning of June 6 and confessed his guilt on the afternoon of June 7.

The question naturally arises: Why were Cooper and Stein not arraigned on June 6 and 7 after they had confessed their guilt? The reason is obvious from the State Police viewpoint. It is not an answer to the requirements of Section 165 of the New York Code of Criminal Procedure, but it emphasizes the good faith of the State Police and negatives innuendos of threats and violence. Wissner was not apprehended in New York City until June 7. He did not reach State Police Headquarters until noon on that day. In the meantime, Dorfman, who had been named as an accomplice in the confessions of Cooper and Stein, was at large and did not surrender until June 19th. The arraignment of Cooper, Stein and Wissner, with the resulting newspaper publicity, would have constituted a signal to Dorfman to abscond. The Police were looking for Dorfman. In fact, defense counsel contend that Dorfman was a fugitive until he surrendered on June 19, 1950, after Cooper, Stein and Wissner had been arraigned before Justice Aylesworth in Chappaqua on the evening of June 8.

The best support for this reasoning is shown by the fact that People's Exhibit No. 62 (1325-2894), a photograph of the arraignment of the three petitioners on June 8, 1950, was published on the front page of at least one New York City newspaper on June 9, 1950, while Dorfman was still at large.

(D) The failure of Cooper, Stein or Wissner to complain on arraignment of any alleged threats or violence exerted against them while in custody.

Although Cooper confessed on June 6, and Stein on June 7, 1950, these petitioners were not arraigned before the late Justice Aylesworth in Chappaqua until the evening of June 8, 1950. It is evident that nothing could have been added to the complete confessions of Cooper and Stein after they had been made on June 6 and 7.

This Court's attention is invited to People's Exhibit 62, page 2894, the photograph showing the arraignment of the three petitioners on June 8, 1950. Cooper and Wissner show great diligence in hiding their faces. Their arms are functioning well. Stein appears ashamed and remorseful. None appear to be subjects for medical or hospital care.

Cooper was 42 years of age at this time and had been previously convicted on four separate occasions including one for murder (100). Stein was 51 years of age and had been previously convicted on five separate occasions, including two robbery convictions (101). Wissner was 39 years of age and had previously been convicted on two separate occasions of attempted robbery and robbery (102). They were not unsophisticated youths but mature males familiar with criminal court procedure.

At the arraignment of Cooper, Stein and Wissner on June 8, 1950, they were in open court. Spectators were present. Not one of the three petitioners complained to the presiding Justice of any threats, violence or ill-treatment of any kind from the time of their arrest until the arraignment. They were not held incommunicado at this time but were scrupulously advised of their rights by the late presiding Justice (1269-1272, 1856-1857). The clerk of the court said all the defendants were well able to talk (1269).

Stein and Wissner were with the District Attorney at State Police Headquarters shortly before their arraignment, and all three defendants were with him when he arraigned them before the Magistrate. None of them complained to the District Attorney at those times.

(E) None of the three petitioners complained to Doctor Robert D. Vosburgh, attending physician at the Westchester County Jail, on the morning after their arraignment, that they had been threatened or subjected to violence of any kind.

It is only fair to emphasize at this time that the physical examinations of Cooper, Stein and Wissner by Doctor Vosburgh, the attending physician at the Westchester County Jail on June 9, 1950, the morning after their arraignment, was a routine examination given to every newly admitted prisoner according to regulations then in force at the Westchester County Jail (1242-1243). These physical examinations were not made in pursuance of any complaints by the three petitioners. Other prisoners who had been in the jail for some time were examined by Doctor Vosburgh on the same morning (Ex. 000, pp. 1758-3008).

Doctor Vosburgh testified that none of the defendants complained to him that they had been mistreated by the State Police. He further stated that if any such complaints had been made he would have recorded them (1243-1244, 1728). He also stated that the bruises found on Cooper could have been present for six days. Cooper had been in custody four days when examined. It was difficult for him to tell how long they were present (1246). The doctor did not know when or where the bruises were sustained. He said they could have been self-inflicted (1249).

The only evidence of injury to Stein, according to the report of Doctor Vosburgh's examination on June 9, 1950, was the bruise in the left bicep area (1741). The

doctor testified that this bruise could have been sustained by Stein prior to his arrest on June 6, 1950 (1745). The doctor did not know how this bruising of the left bicep was sustained by Stein and Stein never told the doctor how he sustained the bruise (1745).

(F) Stein's failure to complain to the County Judge upon his arraignment to plead to the original indictment.

John J. Duff, Esq., of counsel for the petitioner, Stein, testified on the trial that with the assistance of the District Attorney, he was permitted to visit Stein at the Westchester County Jail on the afternoon of June 9, 1950, the day after the arraignment of Stein in Chappaqua before Justice of the Peace Aylesworth (1839). He observed certain bruises on Stein at this time (1839) but admitted on cross-examination that he did not know when or where Stein sustained the bruises (1850).

Mr. Duff also testified that one week later, on June 16, 1950, he appeared with Stein before the Westchester County Judge when Stein entered a plea of not guilty to the original indictment and Duff also conferred with the court about withdrawal. Neither Stein nor Duff complained to the County Judge that Stein had been beaten or threatened (1848-1849).

Thomas J. Todarelli, Esq., of counsel for the petitioner, Cooper, also testified to a visit made by him to the Westchester County Jail on June 10, 1950, at which time he interviewed Cooper in the company of Daniel Reisner and Peter L. F. Sabbatino, Esqs., of counsel for Cooper. Mr. Todarelli found certain bruises on Cooper at this time (1260). He was also permitted to make a copy of the report of the medical examination of Cooper made by Doctor Vosburgh the day before (1264). Mr. Todarelli did not know when or where Cooper sustained the alleged bruises that he had described (1266).

It should be pointed out at this time that neither Mr. Sabbatino nor Mr. Reisner testified as to their observations of Cooper's physical condition on this occasion.

Although Deputy Warden Allen of the Westchester County Jail was called as a defense witness (1272-1857), no testimony was adduced that Cooper, Stein or Wissner complained to him at any time that they had been threatened or mistreated by the State Police or anyone else.

During the first night of incarceration of the petitioners in the Westchester County Jail prior to the routine physical examination made by the jail doctor, there were no guards outside the individual cells to watch or observe the petitioners and that there was only one guard covering the cell block wing (1867-1868). There was thus an opportunity from approximately midnight until the morning for the petitioners to inflict injuries upon themselves. This action by desperate men has received judicial recognition (*People* v. *Valletutti*, 297 N. Y. 226, 237).

No further testimony having been offered as to the exertion of threats or violence against Cooper and Stein, there was a complete failure of proof on the part of these petitioners that their confession had been "made under the influence of fear produced by threats" (Sec. 395, N. Y. Code Crim. Proc.).

Procedure on preliminary examination as to the voluntariness of the confessions.

In the Wissner brief at pages 8 and 9 there was a discussion of New York State procedure on confessions: I believe we should point out that it is now and was at the time of this trial a settled practice to limit the cross-examination of a defendant who testified on preliminary examination as to the voluntariness of the confession to the issues of voluntariness and credibility only. In *People* v. *Tice*, 131 N. Y. 651, it was stated that there is a right

of general cross-examination given to the People but departure from this rule began with *People* v. *Trybus*, 219 N. Y. 18, where the district attorney limited his cross-examination to the issue of voluntariness and the trial court instructed the jury that the prosecutor was so limited by law. The Court of Appeals in that case does say that there is a right of general cross-examination but limitation is within the wise discretion of the trial court. However, since that case cross-examination of a defendant who testifies on preliminary examination has been limited in practice to the issue of voluntariness and he is not subject to cross-examination on the merits of the charge against him. For instance, in *People* v. *Doran*, 246 N. Y. 409, one of the leading cases in this State on confessions, cross-examination of that defendant was limited strictly to the alleged violence (fols. 3466-3550, pp. 694-710 in Volume 2141 of Court of Appeals (N. Y.) cases). In the very recent case of *People* v. *Malinski*, 292 N. Y. 360, in this court, as *Malinski* v. *New York*, 324 U. S. 401, again the cross-examination was limited to the voluntariness of the confession (fols. 1664-1706, pp. 555-569 of the Record on Appeal as printed in Vol. 4226 of Court of Appeals (N. Y.) cases).

Under these circumstances, in accordance with well-accepted principles, the most that can be said for the petitioners is that issues of fact as to the voluntariness of Cooper's and Stein's confessions were presented. These were properly left to the jury under the doctrine of *People* v. *Doran*, 246 N. Y. 409, where the New York Court of Appeals set forth the correct procedure at 415-416:

> "When the point in the trial was reached at which the prosecution sought to introduce the confession, the learned trial justice very fairly and in accordance with our procedure took testimony both for the prosecution and for the defense upon the question of whether or not the confession was voluntary or was the outcome of

fear and violence. Upon this question there was a dispute of fact. Doran, called as a witness in his own behalf at this stage of the prosecution, testified that he did not know what he was saying because of the beatings which he had received from the police officers. Numerous witnesses, hereafter referred to, contradicted him and showed that the confession was made both to the officers and to the assistant district attorney voluntarily, and after Doran had been confronted both by Harrington and by Damp, who had confessed.

"Here was an issue of fact. Who was to decide it? The jury. They heard all the testimony, and the court left it to them to say, after a very full and complete charge, whether or not the confession was voluntarily made, and instructed them that if they concluded that it was not voluntary, but had been obtained under the influence of fear produced by threats, they should throw it out of the case altogether, and disregard it. The judge told them that the People must prove and they must find it to be a voluntary confession before it could be received as evidence. This is not only according to the practice in this State in the trial of criminal cases, but is also the law. When there is a conflict of evidence as to whether a confession is or is not voluntary, if the court decides that it is admissible, the question may be left to the jury with the direction that they should reject the confession if upon the whole evidence they are satisfied it was not the voluntary act of the defendant." * * *

"It may be that a question of fact created by Doran's testimony arose as to the voluntary nature of the confession. The jury, under proper instructions, and not the court, were the ones to determine this question of fact. No fault can be found with

the very full and complete way in which the court instructed them upon this issue. In fact, no fault whatever is found with the judge's very able charge. For the judge himself to have determined this question of fact and to have excluded the confession altogether would have been going very far indeed toward usurping the functions of a jury, bordering almost upon arbitrary action."

In the *Doran* case the New York Court of Appeals followed and endorsed similar rulings in earlier cases including: *People* v. *Randazzio*, 194 N. Y. 147; *People* v. *Schermerhorn*, 203 N. Y. 57; *People* v. *Trybus*, 219 N. Y. 18; *People* v. *Nunziato*, 233 N. Y. 394. The same ruling was made by the majority of the Supreme Court Justices in *Lyons* v. *Oklahoma*, 322 U. S. 596 at 601, where the Court held:

"The mere questioning of a suspect while in the custody of police officers is not prohibited either as a matter of common law or due process. *Lisenba* v. *California*, 314 U. S. 219, 239-241; *Wan* v. *United States*, 266 U. S. 1, 14. The question of how specific an instruction in a state court must be upon the involuntary character of a confession is, as a matter of procedure or practice, solely for the courts of the state. When the state-approved instruction fairly raises the question of whether or not the challenged confession was voluntary, as this instruction did, the requirements of due process, under the Fourteenth Amendment, are satisfied and this Court will not require a modification of local practice to meet views that it might have as to the advantages of concreteness. The instruction given satisfies the legal requirements of the State of Oklahoma as to the particularity with which issues must be presented to its juries, *Lyons* v. *State*, 138 P. 2d 142, 164, and in view of the

scope of that instruction, it was sufficient to preclude any claim of violation of the Fourteenth Amendment."

This Court affirmed the murder conviction of Lyons.

(G) Cases cited by the petitioners where convictions were reversed because of extorted confessions are not in point because in those cases the defendants testified as to threats or beatings and were corroborated by other evidence.

Watts v. *Indiana*, 338 U. S. 49;
Turner v. *Pennsylvania*, 338 U. S. 62;
Harris v. *South Carolina*, 338 U. S. 68.

These cases were all decided by a divided court, the *Turner* and *Harris* cases turning upon a 5 to 4 vote by the Justices of the Supreme Court. A reading of the opinions of the State courts in these cases discloses that in all of these cases the defendants took the witness stand and testified as to the alleged brutality inflicted upon them in order to obtain the purported confessions. These defendants raised a question of fact for the trial court by their testimony.

In the *Watts* case, the defendant testified that he had been beaten, starved, threatened and abused. *Cf. Watts* v. *State*, 82 N. E. (2d) 846, at 848-849.

At the trial in the *Turner* case, the defendant denied the truth of the confession and asserted that it had been procured from him by fear and physical abuse. *Cf. Commonwealth* v. *Turner*, 358 Penna. 350; 58 Atl. (2d) 61, at 63.

During the trial in the *Harris* case, the defendant testified as to being struck by two police officers while detained and before the alleged confession was obtained. Harris

also swore that during his questioning "one large officer" had a blackjack shaking it at him and that one of the officers also threatened the appellant with a beating with a rope and rubber hose if he did not confess the killing. *Cf. State* v. *Harris*, 212 S. C., 124, 46 S. E. (2d) 682 at 684.

Although the Supreme Court reversed the convictions in these cases, with four of the nine Justices dissenting in two cases, it is evident that the appellants at least presented testimony based on alleged eyewitness knowledge as to the alleged beatings of the appellants. No such evidence is available to the petitioners in the instant cases, all three petitioners having refused to testify in their own behalf.

In *Stroble* v. *California*, 343 U. S. 5, decided April 7, 1952, Vol. 96, Law Ed. 529 at 540; Mr. Justice Clark, writing for the majority of the Justices of the Supreme Court, affirming the judgment of the California Supreme Court which affirmed the petitioner's conviction of murder in the first degree, summed up the law applicable to the technique of counsel for the three petitioners in the case at bar in substituting surmise, speculation and legalistic argument for competent evidence when they attempt to allege that the confessions of Cooper and Stein had been coerced:

> "If the result of the adjudicatory process is not to be set at naught, it is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside, and that it be sustained not as a matter of speculation but as a demonstrable reality."

The judgment of the Supreme Court of California was affirmed.

In *Ashcraft* v. *Tennessee*, 322 U. S. 143, cited by petitioners, Ashcraft testified in his own behalf as to the alleged coercion exercised upon him by the police including

continuous questioning of him by the police in relays for thirty-six hours.

The petitioners in the instant applications attempt to transplant the facts of *Ashcraft* v. *Tennessee* to their own cases. There is no proof in this record that either Cooper, Stein or Wissner were questioned in relays. On the contrary, Cooper was allowed to sleep on a mattress and Stein was allowed to sleep on the morning and night of the day of his arrest, and on the following morning he confessed on his own motion. Both were given the same meals that the police received. Wissner was arraigned on the evening of the day after his arrest and never confessed his guilt. Wissner was also given a place to sleep (2028).

In *Malinski* v. *New York*, 324 U. S. 401, reversing *People* v. *Malinski*, 292 N. Y. 360, 55 N. E. (2d) 353, Malinski took the stand in his own behalf on the trial and testified as to alleged violence exerted against him by two police officers. Moreover, this Court gave great consideration to the improper summation of the prosecution in reversing the judgment of death (*Cf.* opinion of Mr. Justice Douglas at pp. 405 to 407 including footnotes).

The County Judge of Westchester County, who presided at the jury trial in the cases at bar, had the *Malinski* case well in mind during the early stages of the trial of the three petitioners as appears from his comment to counsel for petitioner, Cooper, in the absence of the jury (1275). At page 1280 of the record the following declarations were made by the Trial Judge:

> "The Court: The People of the State of New York v. Malinski—have you read that?
>
> Mr. Sabbatino: I have it.
>
> The Court: I have it before me. That went to the Supreme Court of the United States, and that subscribes to the rule as to arraignment very clearly,

and it has been approved by the highest court of this State and by the Supreme Court of the United States, and which I propose to charge in this case. The rule is very clear and I will state it to the jury at the proper time."

The argument of the prosecutor on this point also appears at pages 1280 and 1281.

In *Lisenba* v. *California*, 314 U. S. 219, the defendant testified on the trial that the police officers beat him; that his body was made black and blue; that the beating impaired his hearing and caused a hernia. The defendant had confessed the murder of his wife.

This testimony was contradicted by numerous witnesses for the State, as in the instant cases. It was admitted that the defendant was repeatedly and persistently questioned from Sunday night until Tuesday morning. No such proof exists in the cases at bar.

In spite of the prolonged questioning of Lisenba and his testimony as to the beatings administered to him, this Court affirmed the conviction.

The majority of the Court held (238-239):

"Here, judge and jury passed on the question whether the petitioner's confessions were freely and voluntarily made, and the tests applied in answering that question rendered the decision one that also answered the question whether the use of the confessions involved a denial of due process; this notwithstanding the issue submitted was not eo nomine one concerning due process. Furthermore, in passing on the petitioner's claim, the Supreme Court of the State found no violation of the Fourteenth Amendment. Our duty, then, is to determine whether the evidence requires that we set aside the finding of two courts and a jury, and adjudge the admission of

the confessions so fundamentally unfair, so contrary to the common concept of ordered liberty, as to amount to a taking of life without due process of law.

"In view of the conflicting testimony, we are unable to say that the finding below was erroneous so far as concerns the petitioner's claims of physical violence, threats, or implied promises of leniency."

In *People* v. *Crum*, 272 N. Y. 348, the New York Court of Appeals emphasized that the seven Judges of this court in a capital case are obliged to weigh the evidence and form a conclusion as to the facts.

Chief Judge Crane, at 272 N. Y., pages 349 and 350, said:

"The Constitution of this State in Article VI, Section 7, provides that the jurisdiction of the Court of Appeals, except where the judgment is of death, shall be limited to the review of questions of law. 'This', said the court in *People* v. *Gaffey* (182 N. Y. 257, 259), 'enables us to review the facts in capital cases as we always did'. A review of the facts means that 'we shall examine the evidence to determine whether in our judgment it has been sufficient to make out a case of murder beyond a reasonable doubt. We are obliged to weigh the evidence and form a conclusion as to the facts. It is not sufficient, as in most of the cases with us, to find evidence which presents a question of fact; it is necessary to go further before we can affirm a conviction and find that the evidence is of such weight and credibility as to convince us that the jury was justified in finding the defendant guilty beyond a reasonable doubt."

This doctrine was followed by the New York Court of Appeals in *People* v. *Valletutti*, 297 N. Y. 226 at 231, decided March 11, 1948. The seven Judges of the New York Court of Appeals certainly followed the same pro-

cedure in the three cases at bar and unanimously affirmed the convictions of the three petitioners.

United States v. *Carignan* (decided November 13, 1951), 342 U. S. 36, 96 Law Ed. Vol. 96, page 57, cited by petitioners, Cooper and Stein, is not applicable. The defendant was convicted of first degree murder in the United States District Court for the Territory of Alaska. The United States Court of Appeals for the Ninth Circuit reversed the conviction (185 Fed. (2d) 954). The sole ground of reversal was the admission of a confession obtained in a manner held contrary to the principles expounded in *McNabb* v. *United States*, 318 U. S. 332, and *Upshaw* v. *United States*, 335 U. S. 410.

The Supreme Court sustained the reversal of the conviction because the Trial Judge refused to permit the defendant to testify that the confession was involuntary, but held that the surrounding facts did not necessarily establish coercion, physical or psychological, so as to render the confession inadmissible.

Most important, the Supreme Court, with no dissents, held that "so long as no coercive methods by threats or inducements to confess are employed, constitutional requirements do not forbid police examination in private of those in lawful custody or the use as evidence of information voluntarily given".

It must be noted that criminal prosecutions in the Federal Courts proceed under rules enunciated by the Supreme Court, whereas criminal prosecutions in the State Courts are not subject to such rules. As Mr. Justice Reed, writing for the majority in *Gallegos* v. *Nebraska*, 342 U. S. 55, said:

> "The decision and judgment below determine for us that under the law of Nebraska such detention and examination, without appearance or arraignment, do

not require exclusion of the confessions or plea as involuntary. The rule of the *McNabb* case considered recently in United States v. Carignan, No. 5, October Term, 1951 (U. S. , , *ante*, 57, 72 S. Ct.), is not a limitation imposed by the Due Process Clause. McNabb v. United States, 318 U. S. 332, 340, 87 L. ed. 819, 823, 63 S. Ct. 608; Lyons v. Oklahoma, 322 U. S. 596, 597, note 2, 88 L. ed. 1481, 1483, 64 S. Ct. 1208. Compliance with the McNabb rule is required in federal courts by this Court through its power of supervision over the procedure and practices of federal courts in the trial of criminal cases. The power over state criminal trials is not vested in this Court. A confession can be declared inadmissible in a state criminal trial by this Court only when the circumstances under which it is received violate those 'fundamental principles of liberty and justice' protected by the Fourteenth Amendment against infraction by any state."

In *Gallegos* v. *Nebraska*, 342 U. S. 55, Law. Ed. Vol. 96, page 82, decided November 26, 1951, cited in the Cooper and Stein briefs, the defendant testified that he had been mistreated and threatened with violence while detained in Texas before he was returned to Nebraska to face a manslaughter charge. Gallegos confessed his guilt while so detained in Texas. The defendant had been detained for twenty-five days before being arraigned before a magistrate and could neither write nor speak English. Gallegos had been detained in Texas for eight days during which time no charge was filed against him nor was he arraigned before a magistrate and was then detained in Nebraska for fourteen additional days before arraignment.

The Supreme Court affirmed the conviction despite the testimony of the defendant that he had been threatened and mistreated before his confession.

Mr. Justice Reed, writing for the majority, said:

"A criminal prosecution approved by the state should not be set aside as violative of due process without clear proof that such drastic action is required to protect federal constitutional rights.

"While our conclusion on due process does not necessarily follow the ultimate determinations of judges or juries as to the voluntary character of a defendant's statements prior to trial, the better opportunity afforded those state agencies to appraise the weight of the evidence, because the witnesses gave it personally before them, leads us to accept their judgment insofar as facts upon which conclusions must be reached are in dispute. The state's ultimate conclusion on guilt is examined from the due process standpoint in the light of facts undisputed by the state. That means not only admitted facts but also those that can be classified from the record as without substantial challenge."

No facts are asserted in the briefs of Cooper, Stein or Wissner which establish any threats or violence on the part of the police.

The rulings of this Court in *Lisenba* v. *California*, 314 U. S. 219, and in *Gallegos* v. *Nebraska*, 342 U. S. 55, are applicable to the facts in the cases at bar because in both cases the defendants testified before the jury as to beatings by police thus raising issues of fact decided by the Jury, and the State Appellate Courts, and not disturbed by this Court.

(H) The instructions of the trial Judge to the jury in connection with the Cooper and Stein confessions and their legal effect on Wissner.

At pages 2765, 2766 and 2767 of the Record, the trial Judge carefully instructed the jury concerning the questions whether the confessions of Cooper and Stein were

given freely and voluntarily:

"Ladies and gentlemen, there have been received in evidence statements alleged to have been made by the defendant Calman Cooper and the defendant Harry A. Stein. It is the contention of the People that these statements are in the nature of confessions and that they were made freely and voluntarily. On the other hand, it is the contention made on behalf of the defendant Calman Cooper and on behalf of the defendant Harry A. Stein that these alleged confessions are valueless as evidence against either of them, because it is contended on behalf of each of these defendants that these statements were made because of force and intimidation and fear visited upon each of them by certain members of the state police and implied coercion because of the manner in which they were kept in custody from the time of apprehension until the alleged confessions were made. You must find beyond a reasonable doubt that these confessions, or either of them, was a voluntary one before you would have a right to consider either of them.

"I charge you that the law of this State with respect to a confession is this, that a confession made by a defendant, whether in the course of a judicial proceeding or to a private person, can be given in evidence against him unless made under the influence of fear produced by threats, or unless made upon a stipulation of the District Attorney that he shall not be prosecuted therefor. By itself, a confession is not sufficient to warrant a conviction without additional proof that the crime charged has been committed."

And so I charge you, ladies and gentlemen, that if you find from the evidence in this case that any of these statements, or either of them, made by the respective defendants, Mr. Cooper and Mr. Stein,

were not freely and voluntarily made, or if you have a reasonable doubt, it is your absolute duty to disregard the entire statement."

The Trial Judge also properly instructed the jury concerning the delay in arraignment of the petitioners. (2767-2768):

"I charge you further that it was the duty of the police to arraign the defendants before the nearest Magistrate without unnecessary delay.

"I will read to you Section 165 of the Code of Criminal Procedure, which provides as follows:

That the defendant must in all cases be taken before the Magistrate without unnecessary delay.

"If you find that the arraignment of the defendants was delayed, you may consider that on the question of the voluntariness of any confession or statement, made by the defendant, Calman Cooper, and the defendant, Harry A. Stein. However, I am charging you that the failure to arraign, in and of itself, is not conclusive against the People, and does not in and of itself, standing alone, destroy the validity of the confession. On the question of whether or not the defendant Harry A. Stein and the defendant Calman Cooper were coerced, you may consider whether or not either of them made any complaints at the time of the arraignment, either to the Magistrate when arraigned, or to the jail physician when examined.

"And I also charge you that evidence, as to arraignment, if true, is not, however, conclusive as against the defendants Harry Stein and Calman Cooper. I again charge you that you may consider, or this jury may consider it on the issue of whether or not the confessions were voluntarily made or were involuntarily made. If you find that any one or all of these confessions—and I have charged this before—were

involuntarily made, I charge you you must disregard them in their entirety."

In fact, at page 2777, the Trial Judge instructed the jury that the delay in arraignment of all of the petitioners was unnecessary as a matter of law.

The Trial Judge also carefully protected the rights of the non-confessing petitioner, Wissner, as well as those of the petitioners, Cooper and Stein, when he impressively admonished the jury at pages 2769 and 2770 that statements made by one defendant are binding solely upon that defendant and no one else:

> "And I say to you that it is the law of this state that in determining the question of guilt of the defendants or any one of them, you are not to consider a statement by one defendant as any evidence against the other defendant. I say to you that the alleged statement made by the defendant Calman Cooper cannot be considered by you as evidence against the defendant Nathan Wissner or Harry Stein, and I say to you further and charge you that the alleged statement made by the defendant Harry A. Stein cannot be considered by you as any evidence whatsoever against the defendant Calman Cooper or against the defendant Nathan Wissner. Such statements are to be given such weight as you consider proper, if you consider them voluntarily made, but only as against the defendant who made them."

At other times during the trial, prior to his final charge to the jury, the learned trial Judge repeatedly gave the same admonition to the jury:

> "Mr. Segal: May I ask your Honor at this time to remind the jury that whatever Stein may have said at that time, if he said anything, must not be held against my client Wissner?

The Court: I charge the jury at this time that any statement or alleged statement made by Stein, if believed, is binding only as against him. It is not in evidence as against the other two defendants at this trial, and you must not consider it as evidence as to the other two defendants.

Will you follow that instruction, ladies and gentlemen?"

At page 1456:

"The Court: I will now instruct the jury: I say, ladies and gentlemen, as to the defendant Calman Cooper, if this statement be in the nature of a confession as to what occurred on the afternoon of April 3rd, 1950, it is only binding as against Calman Cooper; it is not in any wise binding upon the other two defendants in this trial, and that is the law of this State and you must accept it. It is not evidence as against Mr. Stein, if his name should be mentioned, and not evidence as against Nathan Wissner if his name is mentioned; it is only binding as against —if believable—it is only binding as against the defendant Calman Cooper."

At page 1994:

"Mr. Sabbatino: As to Cooper, I ask at this time that your Honor instruct the jury that this alleged statement by Stein is admissible, or should be considered by the jury only as to him, if they come to the conclusion that the statement is a voluntary statement, not induced by fear, and that as to Cooper it has no evidentiary value whatsoever.

The Court: Mr. Foreman and ladies and gentlemen of the jury, I now instruct you in regard to this statement or alleged statement: If you find that it was of a voluntary character, and if you find it credi-

ble, the testimony of this witness, then you may consider it only as binding upon the defendant Harry A. Stein; it does not constitute any evidence whatsoever, it has no probative value whatsoever as against the defendant Nathan Wissner or the defendant Calman Cooper. That is the law of this case."

At pages 1942-1943;

"Mr. John O'Brien: May I ask your Honor to instruct the jury that nothing that Stein says in his confession is binding on Cooper?

The Court: I will charge the jury as to the effect of any alleged or proposed statement made by Mr. Stein; it is only binding as against Mr. Stein, and Mr. Stein alone, if voluntary, and if believed; it does not constitute evidence against the other two defendants, if their names happen to be mentioned therein. That is the law of this case, and I shall further instruct the jury as to that law at the close of the case."

At page 1967:

"The Court: I will allow the statement into evidence, subject to the deletions which were made in chambers, with all counsel present, and I will say again to the jury and charge them, that the law of this case is that if the statement is of a voluntary character, which will be submitted to you as a question of fact, it is only binding as against the defendant Harry Stein and does not constitute any evidence whatsoever as against the defendant Nathan Wissner or the defendant Calman Cooper. That is the law of this case and you will abide by the law, as you are bound to do so under your oaths. I will allow it into evidence, subject to the deletions already made."

At page 2245:

"Q. At that time did you have a talk with Wissner? A. Yes.

Q. Can you tell us what you said to him and what he said to you? A. Yes, I said to him that both Cooper and Stein—

"Mr. O'Brien: I object to anything about what he said about the defendant Stein, on the ground that it is incompetent and not binding on the defendant Stein.

The Court: It is not binding on Mr. Stein, that is true—whatever Mr. Wissner said; it is only binding, if it constitutes admission voluntarily made, upon the defendant Wissner."

It is difficult, indeed, to conceive of any further efforts that could have been exerted by the Trial Judge to protect the rights of all of the petitioners in connection with the confessions of Cooper and Stein and the delay in arrignment of the petitioners.

Question of possible deletion of Wissner's name from confessions.

The claim made in Wissner's brief that the name of the non-confessing defendant should be stricken from the confession read into evidence ignores the fact that there are two issues to be decided by a jury before the contents of a confession are to be used in evidence against the confessing defendant. The confession must not only be freely and voluntarily made but a jury is to accept only that portion that it finds to be true in fact (p. 2767). The jury must decide as an issue of fact from the evidence in the case outside the confessions whether what he says therein is true and this issue cannot be decided as it effects the con-

fessing defendant's cooperation with others in the commission of a crime unless the names of those persons are left intact within the confession. Cooper and Stein were here accused of participation in a felony murder in which the shooting was done by defendant Nathan Wissner who was a fellow conspirator in planning and executing the underlying felony of Robbery. Their confession to be relevant evidence must connect them with the underlying felony and the co-conspirator who did the actual shooting. A substitution of some letter of the alphabet makes it impossible for a jury to make any factual findings where several persons are involved in planning and executing the crime.

It is worthy of note that although letters of the alphabet were substituted for names in the confession of Malinski, the trial Court in that case pointed out a confessing defendant is only entitled to an instruction to the jury to disregard any reference to the other defendants (p. 543, fol. 1629 of Malinski record) (292 N. Y. 360).

Professor Wigmore (Cf., *Wigmore on Evidence*, Third Edition, Vol. VII, Sec. 2100 (d) p. 496) sets forth the well-accepted practice in the United States of admitting in evidence confessions of defendants in which non-confessing defendants are named:

> "(d) Since Confessions are not admissible against third persons (*ante*; §§ 1076, 1079), the *names of other co-indictees*, mentioned in a confession used and read against the party making it, were by most English judges ordered to be omitted. But by other judges the names were ordered read and the jury instructed not to use the confession against them. In Canada and the United States the latter practice is favored."

United States v. *Ball*, 163 U. S. 662; *Johnson* v. *United States*, 82 Fed. (2d) 501, and *People* v. *Fisher*, 249 N. Y.

419, 164 N. E. 336, are cited by Professor Wigmore. In the *Fisher* case three defendants were tried jointly. One of them never admitted his guilt. The trial Court denied motions for separate trials and the confessions of the two confessing defendants were received in evidence under proper instructions that they were not binding on the non-confessing defendant.

People v. *Doran*, 246 N. Y. 409, also stands for the same proposition. Here the confession of the co-defendant, Harrington, was read to the jury although it contained frequent references to Doran's participation in the murder (Cf., Record on Appeal to New York Court of Appeals, fols. 5755-5912). The conviction of Doran was affirmed.

See also:

Comm. v. *Millen*, 289 Mass. 441, 194 N. E. 463;
Comm. v. *Terengo*, 234 Mass. 56, 124 N. E. 889;
Peo. v. *Roxborough*, 307 Mich. 575, 12 N. W. (2d) 466; cert. denied, 323 U. S. 749;
State v. *Newman*, 95 N. J. L. 280, 113 Atl. 225;
State v. *Fox*, 133 Ohio St. 154, 12 N. E. (2d) 413;
State v. *Grossman*, 189 Wash. 124, 63 Pac. (2d) 934.

This disposes of the contentions of the non-confessing petitioner, Wissner, in the cases at bar.

Wissner claims unfairness by the District Attorney in reading a particular portion of the confessions during his summation. This argument claims that the District Attorney's explanation to the jury that this was done to answer an argument of Wissner's counsel that "Dorfman was not the driver in the confession" (2697) was merely a pretext. The District Attorney had every right to answer the chal-

lenge made by Wissner's counsel that Dorfman's role of the driver was fabricated by him in August and was not in the confession (2573-2574). While the reading of portions of the confession by the District Attorney is now criticized, Wissner's counsel then invited the jury to scrutinize them (2574).

To argue that a jury, under the proper instructions of the Court existing in this case, were unable to make the simple decision that the confessions of Stein and Cooper could not be used against Wissner in deciding his guilt or innocence, is to denounce the jury system. Under this fallacious theory of Wissner, a jury could never fairly sit in a criminal case involving a joint trial of two or more defendants where at least one of the defendants had confessed his guilt. Such a specious argument answers itself.

Conclusion.

We respectfully submit:

(1) That all of the petitioners were accorded a fair trial in accordance with the due process clause of the Fourteenth Amendment and in accordance with the mandate of the New York Penal Law; the New York Code of Criminal Procedure, the decisions of the New York Court of Appeals and of the Supreme Court of the United States;

(2) That the confessions of Cooper and Stein were freely and voluntarily made, and that those issues were properly submitted to the Jury under well-accepted legal instructions of the trial Judge;

(3) Wissner has no standing on this application. Reference to him in the Cooper and Stein confessions

were binding only upon the confessors and not upon Wissner. The trial Judge so instructed the jury under approved New York law.

The Convictions of the Three Petitioners Should Be Affirmed.

Dated: White Plains, New York,
December 12, 1952.

Respectfully submitted,

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Appendix A.

UNITED STATES CONSTITUTION, AMENDMENT XIV, Section 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Appendix B.

Section 1044, Subdivision 2, of the Penal Law of the State of New York:

"§1044. Murder in first degree defined.

The killing of a human being, unless it is excusable or justifiable, is murder in the first degree, when committed:

2. By an act imminently dangerous to others, and evincing a depraved mind, regardless of human life, although without a premeditated design to effect the death of any individual; or without a design to effect death, by a person engaged in the commission of, or in an attempt to commit a felony, either upon or affecting the person killed or otherwise."

	of these officers was examined by counsel for any of the petitioners concerning threats or violence exerted against petitioners, Cooper, Stein or Wissner, while in custody.)
June 6—10 A.M. to 11 A.M.	Captain Glasheen first saw Stein in the dressing and locker room at State Police Headquarters (1904). Corporal Brann was guarding Stein at this time (1905). Captain Glasheen did not observe anything out of the way with Stein and then conversed with him (1905). This conversation lasted for an hour (1906; 1924). Stein was seated and standing at different times during this conversation and made no complaints to Captain Glasheen (1906). Captain Glasheen instructed the officer assigned to guard Stein to obtain lunch for Stein (1907).
June 6—1:15-1:30 P.M. to 4:15-4:30 P.M.	Captain Glasheen again visited Stein in the dressing and locker room and conversed with Stein for about three hours (1906-1907; 1925). Captain Glasheen alone talked to Stein, with Sergeant Johnson coming in later during this period (1907).
June 6—7 P.M.	Captain Glasheen questioned Stein on and off for several hours and parted company with Stein at 2:15 or 2:30 A. M. on the morning of June 7 (1908; 1926). It was at this time that Captain Glasheen read two answers from the Petitioner, Cooper's, confession to Stein and told Stein to "sleep on it" (1954). Stein never complained to Captain Glasheen (1913).
	While other officers were present (1908), it does not apear that anyone but Captain Glasheen questioned Stein.

June 7—9-10 A.M.	Captain Glasheen received a message from Stein and visited Stein at the dressing room at this time (1908; 1929). Stein told Captain Glasheen that he wished to make a full statement. Stein then made an oral statement (1909). Stein was seated in a leather arm-chair at this time (1909). Telephone booths, cigarette vending machines, ash trays and leather lounge chairs are located in this dressing room (1692-1698). Stein, at this time, told Captain Glasheen of his participation in the crime (1930). Stein told Captain Glasheen that he had slept (1935).
June 7—1 P.M.	Captain Glasheen met Stein and they walked together across the court yard at State Police Headquarters to the Bureau of Identification Room (1910).
June 7—1:15 P.M.	Taking of formal typewritten confession of Stein commenced (1911). Mrs. Anna Klaus, civilian stenographer, took down questions and answers first on typewriter and later in shorthand (1576-1579). Captain Glasheen did the questioning (1578).
June 7—4:30 P.M.	The taking of the Stein confession and the typewriting of it completed (1579; 1914; 1934). According to Mrs. Klaus, no threats, force or violence were used on Stein (1582).
June 7—5 P.M.	Stein signed this confession (Peo. Ex. 64, p. 2896) by 5 P. M. (1937), after having made corrections in his own handwriting.

1950

June 8—1 P.M. to 5 P.M.	Stein visited the premises of The Readers Digest Association with Captain Glasheen and Trooper Crowley and explained how the crime had been committed (1695-1696; 1992-1993).
June 8—10 P.M.	Stein and the other petitioners were arraigned before Justice of the Peace Aylesworth at Chappaqua, Westchester County (2017; 2047). (Cf., Photograph of arraignment; Peo. Ex. 62, p. 2894). Fifteen or twenty spectators were present at the arraignment besides police and petitioners (2043). All of the petitioners failed to complain to the Presiding Justice as to any threats or violence exerted against them (2042).
June 8—11:45 P.M.	Stein received at Westchester County Jail, Eastview, New York (1858).

Summary

Stein was in custody approximately thirty-one hours prior to the oral confession of guilt made by him at 10 A. M. on June 7, 1950. The number of hours of questioning of Stein on four separate occasions during this period total a maximum of twelve.

Stein was in custody approximately thirty-eight hours when he signed the formal typewritten confession (Peo. Ex. 64, p. 2896), at 5 P. M. on June 7, 1950. The questions propounded to Stein and his answers took up approximately three hours on this occasion making a total maximum questioning period of fifteen hours from the time of his arrest until he signed the formal confession and made the corrections that he desired.

Captain Glasheen was present with Stein during all of this time and testified that at no time did anyone beat or mistreat Stein (1931).

Sergeant Johnson of the State Police telephoned a New York City hospital twice at Stein's request in order to inquire about the illness of Stein's mother (2038).

II

Answering arguments in petitioners' reply brief.

The petitioners were permitted by the Chief Justice to file a reply brief within one week after the argument on December 18, 1952. One copy of this brief was received by the District Attorney on January 2, 1953, and contained new arguments and references to additional sources which the People believe must be answered. This portion of the supplemental brief covers those matters.

The New York State Police in the Cases at Bar Had the Power to Arrest the Petitioners Without Warrants Under New York Law.

At the bottom of page 13 of the petitioners' reply brief, received by the District Attorney on January 2, 1953, the incredible statement is made that the New York State Police "have no power to arrest without warrant in a case such as at bar".

This remark displays an abysmal lack of knowledge of the applicable sections of the Code of Criminal Procedure of the State of New York.

In the People's main brief, at page 24, reference is made to Section 223 of the Executive Law of New York. (Book 18, McKinney's Consolidated Laws of New York, Annotated.) Section 223 of the New York Executive Law, quoted in full at page 64 of the People's main brief, grants

to the State Police the power "to prevent and detect crime and apprehend criminals." * * * "They shall have power * * * to exercise all other powers of peace officers of the State of New York."

The definition of arrest and the powers of arrest of peace officers in the State of New York are defined by Sections 167, 168, 170, 177 and 179 of the New York Code of Criminal procedure which read as follows:

"§ 167. *Arrest, defined.* Arrest is the taking of a person into custody that he may be held to answer for a crime."

"§ 168. *By whom an arrest may be made.*

An arrest may be,

1. By a peace officer, under warrant;

2. By a peace officer, without a warrant; or

3. By a private person."

"§ 170. *When the arrest may be made.* If the crime charged be a felony, the arrest may be made on any day, and at any time of the day or during any night. If it be a misdemeanor, the arrest cannot be made on Sunday, or at night, unless by direction of the magistrate indorsed upon the warrant."

"Ch. IV—Arrest by an Officer, Without a Warrant.

§ 177. *In what cases allowed.* A peace officer may, without a warrant, arrest a person,

1. For a crime, committed or attempted in his presence;

2. When the person arrested has committed a felony, although not in his presence;

3. When a felony has in fact been committed, and he has reasonable cause for believing the person to be arrested to have committed it."

"§ 179. *May arrest at night, on reasonable suspicion of felony.* He may also at night, without a warrant, arrest any person whom he has reasonable cause for believing to have committed a felony, and is justified in making the arrest, though it afterward appear that a felony had been committed, but that the person arrested did not commit it."

Of course, felonies had been committed in Westchester County which the State Police, *as Peace Officers*, were investigating, including the armed robbery of the money truck of The Reader's Digest Association and the brutal murder of Andrew Petrini. The State Police had reasonable cause to believe that Petitioner, Cooper, had participated in these crimes because the witness, Jeppeson, (223) had told the State Police that he had rented the truck used in committing these crimes to petitioner, Cooper. The other civilian witness, Percy Brassett, (2053) had also been available to the State Police and had advised them of his prison conversations with Cooper concerning the moneys carried by The Reader's Digest money truck. The petitioner, Stein, had visited the automobile rental agency operated by the petitioner, ~~Wissner, and~~ the accomplice, Dorfman, who testified against his confederates, and the confession of the petitioner, Cooper (Peo. Ex. 59, 2875) implicated the petitioner, Wissner, prior to Wissner's arrest on June 7, 1950.

It is evident that under the quoted sections of the New York Code of Criminal Procedure that the New York State Police had the power to arrest all of the petitioners without a warrant. Reckless and irresponsible statements to the contrary in the petitioners' reply brief should alert

the Justices of the Court to a careful scanning of all other gratuitous statements in the petitioners' reply brief having no basis in law or in fact.

In our main brief (pp. 39 and 40) and on the oral argument, the people contended that it is now the settled practice in New York State for the trial court to limit cross-examination of a defendant who takes the stand on the issue of voluntariness to that issue alone, and always, of course, conceding that any evidence relevant to his credibility as a witness would also be permitted. It was not the people's intention to create an impression that this was a voluntary act on the part of individual District Attorneys, and so we repeat again that it is the trial courts of New York which do not permit general cross-examination. The petitioners' reply brief has cited the records on appeal at pages six and seven, and the people respectfully submit that our reading of the records cited does not change in any way the contentions made upon the argument of this case.

In *People* v. *Valetitti*, 297 N. Y. 226, the defendant was subjected to the heavy attack on his credibility which his criminal record warranted but there was no general cross-examination. At page 132, folio 395, there is a question which appears to involve the crime charged, but comparison with the indictment at page 3, folio 9, shows that this is a question directed to another criminal act as affecting defendant's credibility, and the people were bound by the negative answer of the defendant.

In *People* v. *Mummiani*, 258 N. Y. 394, the defendant himself had mentioned on his direct examination his presence at the scene (p. 59). The court did not rule that general cross-examination was permissible but allowed certain questions as to the contents of the confession on the District Attorney's theory that this line of questioning was to rebut defendant's claim that the factual details were

all suggested to him by the police (see p. 76, folio 226; pp. 87 to 94, folios 259 to 281; and pp. 278 to 284, folios 832 to 852 of the summation).

In *People* v. *Borowsky*, 258 N. Y. 371, the defendant had made a general denial of guilt at the close of his direct examination (p. 328 of the Court of Appeals record on appeal).

If the petitioners' argument on the so-called dilemmatic choice of a defendant who has a previous criminal record were extended to its logical conclusion, then no party to any law suit would be subjected to the test of his credibility as a witness before the triers of the facts. The petitioners quite naturally find no authority for such an extension of the application of "due process".

In fact, the petitioners would have the Justices of this Court believe that the petitioners credibility should not be tested by the people in the event that petitioners testified concerning alleged police brutality. Of course, none of the petitioners did testify however if they had, petitioners now urge that their credibility should not be attacked and their prior criminal records should not be revealed. No authorities are quoted in support of this naive proposition.

On the contrary, it is the well settled practice throughout the Federal Courts that a defendant is to be treated like any other witness. In the case of *United States* v. *Gross, et al.*, 7th C. C. A., 103 Fed. 2nd 11, a defendant, Nolan, confessed, testified on his own behalf that "his confession was induced by a promise of reward and hope of immunity", and was subjected to cross-examination as a witness. The Court there said at 103 Fed. 2nd 13: "It must be remembered that when a party or a witness takes the stand he takes his character with him, and he may be questioned as to collateral matters insofar as the answers thereto may reflect upon his character as a witness."

In his character as a witness, credibility of the defendant is important and this Court has stated that there is no duty on a trial court to prevent a witness from being discredited on cross-examination (*Alford* v. *United States*, 282 U. S. 687, 694).

There is a full discussion of the rights of a defendant with an acknowledgment that differences may arise in the various states in an opinion by Circuit Judge Dobie of the Circuit Court of Appeals, 4th Circuit, in *Simon* v. *United States*, 123 Fed. 2nd 80, at page 85, (writ of certiorari denied, 62 S. Ct. 412), as follows:

> "It is argued that because the defendant was on trial he was not subject to impeachment by cross-examination as to other offences like an ordinary witness. It is well settled, however, that where a defendant elects to make himself a witness he may be cross-examined as such (Citing cases). In the case last cited the rule is well stated by the late Judge McDermott as follows: 'If the defendant takes the witness stand, a different rule comes into play. He steps out of his character as a defendant, for the moment, and takes on the role of a witness, and as such becomes subject to cross-examination in the same manner and to the same extent as any other witness.' * * * In criminal cases, there may therefore be differences arising from variations in the common law in the different jurisdictions at the time of their admission into the Union. It may however be said that, subject to possible variants so arising, it is well settled in criminal cases in the federal courts that cross-examination must be confined to the subjects of the direct examination (citing cases); that the credibility of a defendant who has testified may be impeached in the same manner and to the same extent as any other witness, and no further (citing cases); questions asked

on cross-examination for the purposes of impeachment should be confined to acts or conduct which reflect upon his integrity or truthfulness, or so "pertain to his personal turpitude, such as to indicate such moral depravity or degeneracy on his part as would likely render him insensible to the obligations of an oath to speak the truth" (citing cases); when such a question is asked and answered, the inquiry is ended; the government is bound by the answer in that it may not, on rebuttal, offer countervailing proof (citing cases). To this latter rule, there is one exception: In criminal cases a witness may be asked, for purposes of impeachment, whether he has been convicted of a felony, infamous crime, petit larceny, or a crime involving moral turpitude, and on rebuttal the record of such conviction is admissible. (Citing cases.) * * *" "

No court has ever adopted the principle that defendants with a criminal record may use the existence of that record to avoid testifying before a jury, but that a defendant with an unblemished record must testify and take his chances.

This argument also ignores the judicial review, as in the New York cases cited, of the testimony of such a defendant as a part of the entire record, without any prejudice, and often to his benefit, despite the criminal record brought out on the trial.

As to the Charge of the Trial Judge:

Respondents again state, as they did on the oral argument, that the charge of the Court was limited on the voluntariness of the confession to the New York statutory test (pp. 8 to 11). This argument ignores the portion of the charge quoted in the People's brief at page 52, and the

other portions read to this Court on the argument from page 2768 of the record, which reads as follows:

> "And, ladies and gentlemen, I charge you further that the police are not on trial in this case; that this testimony was adduced solely upon the question as to whether or not the alleged confessions, which were made or alleged to have been made, were the result of coercion, whether direct or implied, which is prohibited by the statute and which invalidates a confession if made."

All of page 52 in the People's main brief, and the following paragraph charged the jury to consider the delay in arraignment, and coercion, and was in addition to the statute provisions of "fear produced by threats".

The Court further charged the delay in arraignment was unnecessary as a matter of law (p. 2777).

None of defendants' trial counsel excepted to the charge on this point nor made any request for any additional language (pp. 2778 to 2787).

The petitioners now say there has never been a determination of voluntariness of the confessions (p. 12). They are well aware that before the Court of Appeals of New York had heard the instant case, they had ruled that a coerced confession would void the conviction regardless of other evidence of guilt (see *People* v. *Leyra*, 302 N. Y. 353, 364). The affirmance is a finding that the confession was not involuntary. Moreover, in amending the remittitur in the cases at bar, the New York Court of Appeals clearly stated that it had necessarily passed upon the issue of whether the admission in evidence of the petitioners' confessions was in violation of "due process" (303 N. Y. 982). That finding was relied upon as a preliminary jurisdictional fact in the petitions for a writ of certiorari (Cooper's Petition, pp. 6 and 7).

Further Misinformation in Petitioners' Reply Brief:

The petitioners in the reply brief state that the District Attorney and his assistants were at State Police Headquarters more than a day before the arraignment (p. 14). This is wholly incorrect as the District Attorney and his assistants arrived there between 4 and 6 P. M. on June 8, 1950, and all three petitioners were arraigned that evening about 10 P. M. The only testimony covering this is by a stenographer from the District Attorney's Office (2126, 2143, 2165) and does not otherwise appear in the record.

CONCLUSION

The convictions of the three petitioners should be affirmed.

Dated: White Plains, New York,
January 7, 1953.

Respectfully submitted,

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